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# The End of History and the New World Order: The Triumph of Capitalism and the Competition Between Liberalism and Democracy

## Introduction

Francis Fukuyama's interesting book, *The End of History and the Last Man*,<sup>1</sup> has garnered an astonishing amount of press. Fukuyama's essay, "The End of History," on which the book was based, appeared in *The National Interest* in 1989, and its publication was followed by what Stephen Holmes aptly described as a "worldwide out-pouring of reactions."<sup>2</sup> It is rare, if not unprecedented, for a mere political theorist to write a scholarly article that garners headlines in popular publications such as *Time*<sup>3</sup> and *Newsweek*.<sup>4</sup>

As many have observed, Fukuyama so seriously mischaracterizes the current state of the world that it is highly doubtful his work will have a lasting influence. It would be unfortunate, however, if the factual shortcomings in Fukuyama's work were allowed to obscure the important and valuable observations which it contains. In this essay we will rehabilitate Fukuyama's argument by identifying the limited extent to which he is, in fact, correct in his observation that history has ended. Next we observe that the dramatic events across the world, including Tiananmen Square, the overthrow of Ceaucescu, the fall of the Berlin Wall, the partial triumphs of democracy in Nicaragua and the Philippines, and, of course,

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1. FRANCIS FUKUYAMA, *THE END OF HISTORY AND THE LAST MAN* (1992).

2. Stephen Holmes, *The Scowl of Minerva*, *THE NEW REPUBLIC*, Mar. 23, 1992, at 27.

3. John Elson, *Has History Come to an End? A Provocative Case: Democracy Has Outlived Communism*, *TIME*, Sept. 4, 1989, at 57.

4. George Will, *Democracy's Last Word?*, *NEWSWEEK*, Aug. 14, 1989, at 66.

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the emergence of democracies in the Commonwealth of Independent States and Eastern Europe, threaten to obscure the important historical reality that, in a very real sense, history is not ending but just beginning.

This essay is divided into four parts. Section One describes what Fukuyama means when he writes that history is at an end, and explains the limited sense in which Fukuyama is correct in his evaluation of recent world events. Section Two, the central part of the essay, explains how recent events show that history, as Fukuyama conceives it, is only beginning and that the stakes in the new game will be even higher than before. Section Three argues that the new history may well pit the United States, the world's only true liberal democracy, against the rest of the world. This essay also argues that while it may seem that the United States is at a disadvantage in this new, global democracy because it is so culturally diverse and pluralist, it has certain advantages that may compensate in the end. Section Four suggests some implications of the preceding analysis for domestic and international law.

## I. Fukuyama and the Hegelian View of History

To understand what Francis Fukuyama means when he says that history has come to an end, one must first understand two things about Fukuyama. First, when Fukuyama says that history is at an end, he means history in the Hegelian or dialectic sense; that is, history as a clash of ideologies. Second, and far more importantly, Fukuyama is a Straussian<sup>5</sup> in the Allan Bloom tradition.<sup>6</sup> Fukuyama's understanding of Hegel (or more precisely, of Alexandre Kojève, who presented Hegel's arguments about the end of history to the world of political science),<sup>7</sup> leads him to observe that history has ended. Fukuyama's membership in the Straussian cult causes him hopelessly to mischaracterize and misinterpret how world history will unfold in the coming decades.

### A. Fukuyama the Straussian

Straussians have caused almost as much distress on college campuses as Marxists. One Yale political scientist, speaking of his opposition to the promotion of a prominent colleague who happened to be a Straussian, was heard to remark, "[t]here are two kinds of people who should never be on a faculty, Leninists and Straussians."<sup>8</sup> Straussians, elitist to the core of their being, believe that a community of men<sup>9</sup> can rise above the

5. "Straussian" is the colloquial term for followers of Leo Strauss, an influential scholar and prominent member of the Committee on Social Thought at the University of Chicago.

6. See ALLAN BLOOM, *THE CLOSING OF THE AMERICAN MIND* (1987).

7. Fukuyama describes Kojève as Hegel's "greatest interpreter in the twentieth century." FUKUYAMA, *supra* note 1, at 66; for further discussions of Kojève's work, see ALEXANDRE KOJÉVE, *INTRODUCTION TO THE READING OF HEGEL* (1947); MICHAEL S. ROTH, *KNOWING AND HISTORY* (1988); THOMAS DARBY, *THE FEAST* (1990).

8. Richard Brookhiser, *Fresh Air?*, NAT'L REV., Mar. 16, 1992, at 44.

9. We use the male pronoun in this section to reflect the Straussian vision that excludes women and focuses exclusively on men.

egalitarianism of Western democracies and achieve a higher level of understanding of the world through careful study of a small number of political philosophers, particularly Plato, Machiavelli, Hobbes, Rousseau, Marx, and Nietzsche.

Straussians believe that material prosperity, in itself, means little. They would have us believe that Western-style democracies can successfully generate the wealth necessary to satisfy man's material cravings, but can do nothing to satisfy man's craving for things deeper and more profound. Thus, as a Straussian, Fukuyama can simultaneously celebrate and mourn the recent triumph of democracy across the world. Fukuyama celebrates because liberal democracies can generate enough wealth to satisfy many of man's desires. Fukuyama mourns because the struggles of the Cold War era, often characterized as primordial struggles between good and evil (witness Ronald Reagan's depiction of the Soviet Union as an "evil empire") enabled citizens to express their urge to place themselves in some sort of worldwide moral context.

The Straussian strand in Fukuyama's book is reflected by the Nietzschean phrase "the Last Man" contained in the second half of the book's title. The phrase captures Nietzsche's idea that once man stops questing for plunder and victory, he will collapse into a hollow shell "emptied of ambition, satisfied with mediocrity, bereft of high ideals, unwilling to make sacrifices."<sup>10</sup> In other words, Fukuyama believes that all the end of the Cold War has brought is the end of the evil empire and the triumph of what he disparagingly describes as "a society of *bourgeois*."<sup>11</sup> Man will have nothing worthwhile to fight against and there will be no frame of reference against which man can define himself as a moral being. This will bring emptiness and frustration.

As Steven Holmes trenchantly has observed in an important essay on Fukuyama:

The only thing that prevented corrupt liberal states from sinking to the ultimate depravity was the moral struggle against Communism. Our final victory, therefore, is our final defeat. Having vanquished Communism, we have nothing to fight for except security, wealth and comfort—but those are not ideal values, they are materialist temptations. Thus history after the struggle will be flat and without interest. Indeed there will be no history worthy of the name.<sup>12</sup>

We will argue that there are two critical flaws in Fukuyama's Straussian vision. First, Fukuyama not only underestimates but fails even to contemplate the possibility that citizens of capitalist democracies can find new outlets for their urges to define themselves in the world as moral beings. The second flaw with Fukuyama's Straussian vision is that he fails to recognize that there are different conceptions of liberalism and democracy and that these differences are likely to provoke the ideo-

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10. Holmes, *supra* note 2, at 29.

11. See FUKUYAMA, *supra* note 1, at 188.

12. Holmes, *supra* note 2, at 27.

logical battles of the future. In the coming decades, heated contests among nations are likely to occur and will capture the spirit of their citizens as much as the East-West rivalries of the Cold War ever did. The new competition will not be between democracies and totalitarian regimes but between liberal and non-liberal capitalist regimes. In other words, Fukuyama fails to comprehend the basic fact that competition among nations can take a variety of forms, and that capitalist countries with different national identities and constitutional infrastructures can compete just as profoundly as capitalist countries once competed with socialist countries.

To generalize rather crudely, liberal capitalist regimes will be characterized as nations governed by a commitment to individual rights. Non-liberal nations will be characterized by a commitment to the interests of the totality. Ultimately, Western nations governed by pluralist ideals that embrace policy-making through interest-group conflict will find the efficacy of their political institutions sorely tested by oriental nations informed by republican values that embrace policy-making through consensus.

#### B. Fukuyama the Hegelian

Fukuyama identifies the Straussian underpinnings of his ideas with his reference to Nietzsche's "Last Man." He links himself to Hegel even more concretely with his central claim that we are at the end of history. And, like Hegel (and Marx, too, for that matter), when Fukuyama declares that we are at the end of history, what he really means is that the age of ideological struggle between competing historical visions of how best to order the world has come to an end.

Since the end of World War II, according to Fukuyama, history has manifested itself as a competition between liberal democracies and authoritarian, usually Marxist, regimes. Liberal democracy in general, and Americanization in particular, has emerged triumphant:

As mankind approaches the end of the millennium, the twin crises of authoritarianism and socialist central planning have left only one competitor standing in the ring as an ideology of potential universal validity: liberal democracy . . . . Two hundred years after they first animated the French and American revolutions, the principles of liberty and equality have proven not just durable but resurgent.<sup>13</sup>

Fukuyama, of course, recognizes liberalism and democracy as separate concepts. Liberalism is a rights-bound concept that recognizes that human beings, as autonomous creatures, are entitled to certain rights. So long as people confine their activities within this sphere of rights, they are entitled to act as they choose and to be free from governmental interference. Following Bryce, Fukuyama identifies three spheres of fundamental rights: property rights, religious rights, and political

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13. FUKUYAMA, *supra* note 1, at 42.

rights.<sup>14</sup>

Democracy has almost nothing to do with liberalism. Democracy simply refers to a system of government under which citizens may participate in governmental decision-making either directly or through representatives.<sup>15</sup> Fukuyama recognizes that democracy is a *manifestation* of liberalism in the sense that political rights, like property rights and religious freedom, are among the basic rights that most conceptions of liberalism embrace. But Fukuyama fails to appreciate the tension between liberalism and democracy.

A basic tension exists between liberalism and democracy because the liberal conception of the primacy of rights inevitably comes into conflict with the democratic conception that majorities be able to control policy. Clearly, in a liberal state, even majorities should not be able to infringe upon an individual's basic rights. Yet, as we define the sphere of inalienable individual rights more broadly, we increasingly constrict the ability of majorities to exercise power.

For example, the decision by a hypothetical liberal state to grant women the right to choose whether to have an abortion necessarily interferes with the right of a majority of that state's citizens to legislate with respect to the rights of the unborn. The state cannot regulate abortion without infringing upon the rights of women to control their bodies; women cannot have complete control over their biological destiny in a regime that gives complete respect to democratic values if the majority wishes to regulate abortion. Similarly, the rights of individuals to own and control private property are subject to a variety of restrictions in a democratic state. These restrictions, which range from rent-control provisions to zoning ordinances, are tolerated in the name of democracy. But such restrictions, though tolerated, will interfere with rights. Pervasive restrictions on property rights demonstrate the fundamental tension that exists between liberal values and democratic values. Nevertheless, democracy and liberalism can coexist, albeit uneasily, at least for a time. Unfortunately, over time, there is a danger that democratic majorities will encroach upon the rights of minorities, especially their economic rights, in order to enrich themselves at the minorities' expense.

The fundamental flaw in Fukuyama's analysis stems from the fact that he fails to recognize the tension between democracy and liberalism. Fukuyama sees democracy and liberalism as natural counterparts and suggests that any separation between the two concepts is only a theoretical construct.<sup>16</sup> This misconception leads Fukuyama to survey the world and reach the bizarre, counterfactual conclusion that liberal democracies are bursting out all over. Whenever he sees any hint of liberalism, including the emergence of free markets, he claims a victory for democ-

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14. *Id.* at 42-43; see also 1 JAMES BRYCE, *MODERN DEMOCRACIES* 53-54 (1921).

15. See FUKUYAMA, *supra* note 1, at 43.

16. *Id.* at 43-44.

racy, even in places like Iran, Peru and Singapore, where scarcely a hint of democracy exists.

Fukuyama's insistence on linking democracy with liberalism leads him to claim that liberal democracies exist whenever any state makes a move towards recognizing property rights and employing a free market to organize an economy. His linkage culminates in the claim that:

[T]he fact that there will be setbacks and disappointments in the process of democratization, or that not every market economy will prosper, should not distract us from the larger pattern that is emerging in world history. The apparent number of choices that countries face in determining how they will organize themselves politically and economically has been *diminishing* over time. Of the different types of regimes that have emerged in the course of human history, from monarchies to aristocracies, to religious theocracies, to the fascist and Communist dictatorships of this century, the only form of government that has survived intact to the end of the twentieth century has been liberal democracy.<sup>17</sup>

Unfortunately for Fukuyama, the facts do not support his assertions. His claim that liberal democracies are emerging triumphant is factually inaccurate in three respects. First, Fukuyama fails to recognize that virtually every democratic state, with the possible exception of the United States, believes in protecting the fundamental rights of only a small sliver of humanity. Israel is a great democracy for Orthodox Jews but not so great for Palestinians or even Reform Jews. Japan is more or less a democracy for ethnic Japanese, but is not so great for ethnic Koreans or other minorities. Even though countries like Iran are democracies in the sense that they have fair elections, it would be ridiculous to characterize such countries as liberal in any sense of the word. The commitment to universal liberal values is collapsing even in ostensibly liberal states such as Germany and Italy under the strain exerted by a rising tide of penniless ethnic minorities from the East.

While Fukuyama's first factual error stems from his failure to recognize either the subtle or the overtly anti-liberal characteristics of most of the world's democracies, his second error stems from the misconception in even the most liberal democracies about the fundamental tension between the democratic commitment to majority rule and the liberal commitment to personal autonomy and individual rights, particularly property rights. Fukuyama fails to recognize that in most of the world's established democracies, particularly the United States, liberal defenders of property rights are fighting a losing battle to prevent the public sector, where democratic values find expression, from destroying the private sector, where the liberal value of free economic activity finds expression.

Fukuyama finally errs in failing to recognize that the world at large does not value universalist democracy. In a crucial and revealing passage, Fukuyama appears to recognize that his claim that liberal democra-

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17. *Id.* at 45.

cies are bursting out all over cannot withstand even the most cursory analysis. So he says that "[w]hat is emerging victorious . . . is not so much liberal practice, as the liberal *idea*."<sup>18</sup> The triumph of the liberal idea will force even non-democrats "to speak the language of democracy in order to justify their deviation from the single universal standard."<sup>19</sup>

Even this assertion is incorrect. What is emerging victorious is a commitment to capitalism and private ordering rather than a commitment to liberal democratic values, or even to democracy without liberalism. This commitment to capitalism and private ordering does not stem from any aesthetic love of free markets, a phenomenon that appears to be unique to the West. Rather, this commitment stems from the recognition, which Hayek<sup>20</sup> and Von Mises<sup>21</sup> correctly stated, that central planning and state-sponsored socialism simply cannot sustain themselves. Not only do they fail to satisfy the basic material needs of their citizens, they also fail to reduce the basic inequalities of the feudal societies they replaced.

## II. The End of the Cold War and the Emergence of the New World Order: Competition for Markets and Prosperity

To a Straussian like Fukuyama, the new Hegelian competition we describe as marking the beginning of history may sound a bit mundane because it focuses on how to preserve markets, rather than on how charismatic national leaders can impose their wills on less forceful or assertive rivals and instill in the nation's citizens a sense of pride and purpose. But Fukuyama has it backwards. The ultimate victors in the march of history will be those nations that can *refrain* from imposing their wills on others, not those that succeed in doing so.

The tumultuous decade of the 1980s, which saw the collapse of Communism in Eastern Europe, did not reflect the triumph of liberal democracy over the forces of tyranny. Rather, Communism collapsed because capitalism is vastly superior to Communism as a mechanism for distributing society's scarce resources (particularly capital) and for creating wealth through the system of voluntary, consensual exchange that is the hallmark of capitalism. Although the replacement of state-sponsored socialism by capitalism as the dominant paradigm for allocating resources is an important development in world history, it hardly marks the end of history. Instead, universal acknowledgement that capitalism and private ordering are superior to socialism and state ownership of the means of production marks the beginning of a new phase of history because now the world must confront the more interesting and difficult question of what sort of constitutional framework provides the best vehi-

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18. *Id.*

19. *Id.*

20. See FRIEDRICH A. VON HAYEK, *THE ROAD TO SERFDOM* (1976).

21. See LUDWIG VON MISES, *ECONOMIC FREEDOM AND INTERVENTIONISM: AN ANTHOLOGY OF ARTICLES AND ESSAYS* (1990); *THE ANTI-CAPITALISTIC MENTALITY* (1972); *BUREAUCRACY* (1969).

cle for containing, promoting, and nurturing a capitalist market economy.

Fukuyama, for example, ignores the fact that capitalist economies can flourish under totalitarian and authoritarian regimes at least as well as under liberal democracies. This is because totalitarian regimes, which do not tolerate individual rights and freedoms and do not embrace democratic values, need not confront the fundamental tension that exists between individual rights and democratic values.<sup>22</sup>

That Fukuyama does not understand that many different political systems can support capitalism is particularly clear in his confusing treatment of Singapore. Fukuyama has a chart called "Liberal Democracies Worldwide" in which he includes Singapore.<sup>23</sup> But later in the book, Fukuyama recognizes that Singapore is not a liberal democracy and acknowledges that Singapore's authoritarianism is distinctive for two reasons, "[f]irst it has been accompanied by extraordinary economic success, and second, it has been justified unapologetically, not just as a transitional arrangement, but as a system superior to liberal democracy."<sup>24</sup>

Significantly, Singapore's leaders view authoritarianism as superior to the liberal democracies of the West precisely because they believe it is a better vehicle for channelling the energies of capitalism. Former Prime Minister Lee Kuan Yew has argued not only that authoritarianism is more compatible with Asia's Confucian traditions, but also that authoritarianism:

is more compatible with consistently high rates of economic growth than liberal democracy. Democracy is a drag on growth, Lee has argued, because it interferes with rational economic planning and promotes a kind of egalitarian self-indulgence in which a myriad of private interests assert themselves at the expense of the community as a whole.<sup>25</sup>

Fukuyama's confusion between capitalism on the one hand and liberal democracy on the other has been summarized succinctly by Alan Ryan:

[T]he most obvious complaint against the view that the whole world is committed to liberal democracy is that most of it is not. Much of Asia is committed to some form of democracy, to the idea that governments are accountable to their subjects, and must maintain constitutional rather than merely personal authority. But this is not *liberal* democracy; it is neither built on nor friendly to the moral individualism that underpins liberalism. It is not concerned with our anxieties about the boundary between the private and the public; it is not worried as we are about keeping government authority out of our sexual, religious, intellectual, and moral allegiances. Lee Kuan Yew has called the system he has built "East

22. See *supra* text accompanying notes 15-17 discussing this tension.

23. FUKUYAMA, *supra* note 1, at 50.

24. *Id.* at 241.

25. *Id.*



Asian Confucian capitalism."<sup>26</sup>

Fukuyama mischaracterizes the world because he confuses the developing world's new-found enthusiasm for market capitalism with an enthusiasm for liberal democracy. He fails to comprehend that it is possible to have an efficient capitalist system without so much as a hint of democracy. That this is no mere theoretical possibility is obvious from totalitarian regimes such as Nazi Germany, where private enterprise flourished. Indeed, the central historical question of the twenty-first century may well be whether capitalism can survive the interest-group proclivities that threaten private property rights in advanced democracies.<sup>27</sup>

The dramatic changes that we have observed in Eastern Europe and in the Pacific Basin since the end of World War II do not represent anything remotely resembling the triumph of liberal democracy. Liberal democracy is viewed with tolerant skepticism if not outright horror by much of the world. Rather, the dramatic changes we have observed in the world show that capitalism has triumphed over state socialism. But the preference of private markets over central planning does not mean that history is at an end.

Indeed, history, in the sense in which Hegel and Kojève used the term, is only beginning. The post-War confrontation between Western capitalism and Western socialism is over, and traditional distinctions between "right" and "left" are no longer particularly meaningful. These changes only sharpen the focus of the debate; they do not mark the end of history. The new clash will not be about how to organize the marketplace but about what sort of nation-state provides the most successful vehicle for fostering capitalism.

Of course important differences will distinguish the ideological clash of the post-War era from the ideological clash of the post-Communist era. For one thing, the conflict has been demilitarized. The winner of the old East-West conflict was the United States because its capitalist system enabled it to generate enough wealth to maintain a high standard of living for its citizens while simultaneously maintaining a massive military-industrial complex. By contrast, the winner of the new conflict will be more difficult to identify because the rules of the game are more difficult to characterize. The system that wins will not simply generate the highest GDP per capita but must best reduce internal conflict and strife while promoting human flourishing and growth.<sup>28</sup>

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26. Alan Ryan, *Professor Hegel Goes to Washington*, NEW YORK REV. BOOKS, Mar. 26, 1992, at 8.

27. See MANCUR OLSON, *THE RISE AND DECLINE OF NATIONS: ECONOMIC GROWTH, STAGFLATION, AND SOCIAL RIGIDITIES* 50-56 (1982).

28. For several reasons, however, a society's capacity for human flourishing and growth is inextricably linked to the ability of that society to succeed economically. Neither human growth and flourishing nor economic success can be achieved unless a country's citizens enjoy a certain amount of liberty. A liberal society as characterized by individual rights—including economic rights—provides citizens with the ability to attain the standard of living necessary for the self-improvement requisite for

While the United States and the Soviet Union were the polar extremes that defined the old East-West struggle, the new struggle essentially pits the United States against the rest of the world and will proceed along at least two vectors. First, as noted in the preceding section, there will be a contest over which cultural system—U.S.-style liberal democracy or Asian-style “Confucian capitalism”—will succeed in dominating world economic markets.

There will be a second struggle over the issue of whether a constitutional system based on ideas of cultural diversity, heterogeneity, and multiculturalism can compete against rival cultures built on homogeneity, strong civic solidarity, and intolerance of even modest deviations from accepted manners and morals. Here the contrast is not only between the United States and Pacific Rim nations, but also between the United States and the emerging democracies in Eastern Europe, which comprise distinct ethnic groups, each with its own language, religion, and cultural identity. Indeed, in sharp contrast to the United States, countries as diverse as India, Belgium, Canada and Yugoslavia all share this common feature.

As suggested in the previous discussion, it is by no means obvious that American-style liberal democracy will emerge the victor. The defining problem with liberal democracy is the problem of pluralism in general and interest-group pluralism in particular. The private interests of individual subgroups in the United States often conflict with the private interests of other subgroups. These subgroups find it advantageous to benefit themselves at the expense of other groups through “rent-seeking”—the process of organizing into interest groups for the purpose of obtaining economic rents (rates of return on the use of an economic asset in excess of the market rate) through government intervention in the market.

Unlike wealth creation, which increases societal wealth, rent-seeking imposes significant costs on society. It can retard growth in a variety of ways:

The most widely understood . . . costs are those that third parties encounter when they attempt to block legislation that threatens to transfer wealth from those third parties to the rent-seeking interest groups. In addition, rent-seeking is inefficient because it can result in several forms of deadweight social losses. For example, deadweight social losses will occur to the extent that interest groups seeking wealth transfers must expend resources to obtain those transfers. As Judge Posner and others

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flourishing and personal growth. Moreover, unless sufficient liberty exists to carve out a clearly delineated, readily defensible sphere of rights for citizens, the persistence of internal conflict and strife will prevent human flourishing and growth from occurring. Finally, human beings are infinitely varied. Only in a society that allows individuals to retain the basic rights against the state and against their fellow citizens will human flourishing and growth be possible. For all of these reasons, the discussion that follows, which focuses on how a society can achieve economic success and how various political systems can provide appropriate support for market economies, also applies to how societies best can promote human flourishing and growth.

have pointed out, an interest group will find it efficient to spend up to \$99.00 to obtain a \$100.00 wealth transfer. This \$99.00 is a deadweight social loss; the figure represents a sum that could have been spent to create wealth.<sup>29</sup>

Thus, a diverse, multicultural nation such as the United States might find itself at a significant disadvantage in global competition because the ethnic, religious, and cultural groups within its borders provide a fertile breeding ground for interest-group wealth transfer activity. In a powerful exposition, Mancur Olson identifies three destructive consequences of interest-group pluralism, all of which, in his view, inevitably will lead to economic decline.<sup>30</sup> First, he argues, "special-interest group organizations and collusions reduce efficiency and aggregate income in the societies in which they operate and make political life more divisive."<sup>31</sup> Second, interest-group coalitions organized to effect wealth transfers "slow down a society's capacity to adopt new technologies and to reallocate resources in response to changing conditions, and thereby reduce the rate of economic growth."<sup>32</sup> Third, interest groups increase "the complexity of regulation, the role of government, and the complexity of human understandings,"<sup>33</sup> which, in turn, impede the economic and social evolution of society and raise the costs of all forms of economic activity.

Fukuyama would argue that this discussion of the economic problems of interest-group pluralism reflects nothing more than petty concerns about "the banalization of life through modern consumerism."<sup>34</sup> Fukuyama is concerned that if material well-being is all that modern man has to fight for, then the inhabitants of Western-style liberal democracies will be mediocre degenerates with no ambition and no high ideals worthy of sacrifice. The threat of interest-group pluralism, however, is hardly banal. Indeed, the Framers of the American Constitution implemented a strong system of divided government characterized by checks and balances and separation of powers to minimize the factionalism that can result from interest-group agitation. The Framers were well aware of the tragic histories of Athens, Rome, Florence, and Venice, where the pursuit of narrow self-interest led to decline. The factionalism produced in these regimes ultimately destroyed the legitimacy of governmental authority. As Alexander Hamilton pointed out in *Federalist* 9:

It is impossible to read the history of the petty republics of Greece and Italy, without feeling sensations of horror and disgust at the distractions

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29. Jonathan R. Macey, *Transaction Costs and the Normative Elements of the Public Choice Model: An Application to Constitutional Theory*, 74 VA. L. REV. 471, 478 (1988). See also Richard A. Posner, *The Social Cost of Monopoly and Regulation*, 83 J. POL. ECON. 807 (1975).

30. OLSON, *supra* note 27, at 74.

31. *Id.*

32. *Id.*

33. *Id.*

34. FUKUYAMA, *supra* note 1, at 4.

with which they were continually agitated, and at the rapid succession of revolutions, by which they were kept in a state of perpetual vibration between the extremes of tyranny and anarchy . . . . If it had been found impracticable, to have devised models of a more perfect structure, the enlightened friends to liberty would have been obliged to abandon the cause of that species of government as indefensible.<sup>35</sup>

Thus, not only will the struggle that emerges in the wake of the Cold War not be banal; it will be precisely the same struggle that obsessed the Framers of the American Constitution. The Framers rejected the age-old idea that the republican virtues of homogeneity and civic solidarity could bring such a diverse country together. They were aware that it had not worked before in other fledgling democracies and believed that the polyglot nature of the American republic made conflict among interest groups particularly inevitable.

Thus, the Framers were not concerned with how to achieve the civic solidarity, republican consensus, and uniformity of manners and morals that are hallmarks of Asian and European democracies, which rest upon bedrocks of similarity. Rather, the Framers' chief concern was over how to control faction. As James Madison pointed out in *Federalist* 10:

It is in vain to say, that enlightened statesmen will be able to adjust these clashing interests, and render them all subservient to the public good. Enlightened statesmen will not always be at the helm: Nor, in many cases, can such an adjustment be made at all, without taking into view indirect and remote considerations, which will rarely prevail over the immediate interest which one party may find in disregarding the rights of another, or the good of the whole.<sup>36</sup>

In other words, the Framers *anticipated* the phenomenon of interest-group pluralism that is the hallmark of modern American political life and designed a constitutional system to mitigate the resulting factionalism. They realized that the same self-interest that guides commercial transactions in the private sector also guides behavior in the public sector. The difference is that in the private sector self-interested behavior generally leads to efficient, socially desirable, value-maximizing outcomes, but in the public sector, it leads to what Judge Richard Posner calls "amorally redistributive" wealth transfers.<sup>37</sup>

The Framers made it clear that a primary goal of the new Constitution was to control the ability of interest groups to achieve antimajoritarian outcomes in the political process. A dominant theme in the *Federalist* is the desirability of adopting the Constitution as a means of controlling interest groups.<sup>38</sup> Many structural features in the Consti-

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35. THE FEDERALIST No. 9, at 50, 51 (Alexander Hamilton) (Jacob E. Cooke ed., 1961).

36. THE FEDERALIST No. 10, at 60 (James Madison) (Jacob E. Cooke ed., 1961).

37. Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 268 (1982).

38. Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV., 29, 29 (1985).

tution were specifically designed to combat the problem of wealth transfers by interest groups:

The Constitution employs a bicameral legislature, with houses of widely different sizes. The American constitutional system also institutes a regime of checks and balances by creating both a federal judiciary that is insulated from political pressure because its judges have life tenure and salaries that cannot be reduced, and a federal executive with authority to veto acts of Congress. In addition, each of the three branches of government must appeal to different constituencies for political support, thereby further reducing the power of interest groups to affect political outcomes. Finally, the Constitution envisions a federal form of organization in which citizens are free to travel among the several states, thereby reducing the incentives of individual states to engage in transfer activities.<sup>39</sup>

These features impede wealth transfer activities by interest groups in ways that are sometimes quite subtle. For example, Article I of the Constitution, which causes the two houses of the legislature to be of widely different sizes, impedes the efficacy of interest groups by raising the costs of achieving consensus.<sup>40</sup> Similarly, Article I requires each house of Congress to represent different constituencies. By increasing the scope of the consensus that must be obtained in order to achieve passage of a law, this makes it more difficult for narrowly focused interest groups to pass legislation. These and other structural provisions of the Constitution have "imposed what is, in effect, a supermajority voting rule, which raises decision costs and makes favorable treatment less likely for special interest groups."<sup>41</sup>

Consequently, while capitalism may have triumphed over socialism, the triumph of capitalism is not equivalent to the triumph of liberal democracy. Thus, Fukuyama is correct in his assessment that for the first time in human history a worldwide consensus has emerged about how to order society, but the scope of consensus is far narrower than Fukuyama would have us believe. That consensus holds only that market systems are the best way of allocating scarce resources in an economy. There simply is no consensus about which constitutional system best harnesses and directs capitalist forces.

History, in Fukuyama's sense, is only beginning because the fundamental issue of what sort of regime will best protect economic exchange and economic rights against the ravages of special interests is still open to question.

### III. The New World Order and the American Political Tradition

As illustrated by the preceding section, the defining characteristic of the New World Order is its embrace of market capitalism, rather than its

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39. Macey, *supra* note 29, at 510. See also Geoffrey P. Miller, *Rights and Structure in Constitutional Theory*, 8 Soc. PHIL. & POL'Y 196 (1991).

40. JAMES M. BUCHANAN & GORDON TULLOCK, *THE CALCULUS OF CONSENT* 45-57 (1966).

41. Macey, *supra* note 38, at 248.

acceptance of liberal democracy. The debate about how to structure society has not ended, but has become more sharply focused on what sort of political system will best preserve and protect market capitalism. The sharpened debate raises three fundamental issues about how best to organize a modern society. These issues are: (1) the role of democracy and representation in a capitalist economy; (2) the role of federalism and state autonomy in emerging common markets; and (3) republicanism versus pluralism.

Although, as suggested above, the Framers of the United States Constitution faced identical issues in America at the end of the eighteenth century, the current twentieth-century debate is different because it has moved to a world stage. In 1776, as now, the debate generally was characterized as a dispute over lofty philosophical principles. In fact, however, the real issue today, as then, is how best to protect property rights and private markets from the tyranny of special interests and renegade majorities who generally will succeed in their efforts to control democratic processes.

#### A. Inclusionary and Exclusionary Democracies

Fukuyama at one point defines democracy as "the right held universally by all citizens to have a share of political power, that is, the right of all citizens to vote and participate in politics."<sup>42</sup> But note the sleight of hand. As long as a country is free to define who its citizens are, it will easily qualify as a democracy. Even a repressive regime such as South Africa in the era of apartheid qualifies as a democracy, if the regime can define who among its resident population qualifies as a citizen.

The point here is to distinguish two kinds of democracies: those that are exclusionary and those that are inclusionary. A country is an inclusionary democracy if it has no *a priori* vision of which peoples are entitled to qualify as citizens. A country is an exclusionary democracy if it limits citizenship eligibility on the basis of religion, creed, race, or other identifying characteristics.

At the outset, it is striking that most, if not all, of Fukuyama's emerging "liberal democracies" are exclusionary democracies. For example, the independence movements in the former Soviet and Yugoslavian republics are, in Fukuyama's sense, aimed at achieving liberal democracies. But these revolutionary movements are seeking to establish and gain international recognition for new political entities defined along narrow ethnic lines. Therefore, they are exclusionary democracies.

Similarly, the democracies in the Middle East (including Israel) and the Pacific Rim (including Japan and Korea) are exclusionary democracies. Even countries like France and Italy, which do not appear to have even *informal* rules or legal norms that would have the effect of systematically excluding certain groups, have made it clear over the years that

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42. FUKUYAMA, *supra* note 1, at 43.

they would not welcome sufficiently large numbers of immigrants who might threaten their national identity. Similarly, the former West Germany, whose people were remarkably open both to reunification with their impecunious eastern neighbors and to accepting people of German extraction from other countries in Eastern Europe and the former Soviet republics, has limited its hospitality to immigrants who can make some credible claim to being German.

It is important to emphasize that the dichotomy between inclusionary and exclusionary democracies is descriptive rather than normative. The goal is not to condemn exclusionary democracies. Rather, the point is simply to acknowledge that they exist, and that they are the norm in the world at large. Although the New World Order may bring a new level of cooperation and goodwill among nations, it is unlikely to bring a new conception of democracy *within* nations.

The striking exception to the general world model of exclusionary democracy is the United States. What is notable about the United States is not that it has achieved the status of a completely inclusionary democracy. Rather, the United States is remarkable because it officially includes the considerable number of ethnic groups living within its borders as equal citizens. Indeed, it is worth noting that the American federalist system, unlike the federalist system being proposed in the European Community, is not based on a system of political subgroups with distinct identities.

Thus, the core feature that distinguishes the United States from virtually all other emerging or existing democracies is its formal commitment—sometimes observed only in the breach—to inclusiveness and equal protection.<sup>43</sup> Although the difference between the United States as an inclusionary democracy and other countries as exclusionary democracies may appear obvious, it is quite subtle. The difference does not always manifest itself in legal rules that afford ethnic minorities in the United States greater legal protection than minorities in other countries. Rather, the difference manifests itself in the way the United States sees itself. This self-image may be nothing more than a romantic vision, but it is vitally important nonetheless.

Two things are clear. First, the United States was a remarkably diverse country at the time of the framing of its Constitution. Not only did the citizens of the various states have competing interests, but the population comprised a rich mix of religious and ethnic groups. As Nathan Glazer has observed:

Several kinds of diversity characterized the United States at the time of the writing of the Constitution (which was 180 years after the beginnings of permanent English colonization on the eastern shores of North America). The United States was already more diverse in religion than any nation in Europe . . . .

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43. U.S. CONST. amends. XIII, XIV, XV.

In addition to religious and racial diversity, there was ethnic diversity. The Anglo-Americans, the dominant group by far, were divided and included Scots, Welsh, and Scotch-Irish; there were also Dutch, German, Irish, Jews, and many more.

The Middle Colonies in particular showed a mix of ethnic groups. Jews arrived early in New Amsterdam. Pennsylvania became a home to persecuted German sects, and its German population became so large that it aroused the concern of Benjamin Franklin.<sup>44</sup>

The second point is that the Framers nurtured this diversity. The U.S. Constitution rejects the classical republican vision of civic virtue through homogeneity and instead embraces the "new idea that competitive diversity is natural to man, and that diversity can potentially play a creative role in a new kind of republicanism."<sup>45</sup> Pluralism and diversity are sources of strength because the shifting coalitions among the many competing ethnic, religious, and racial groups that comprise the United States prevent a single faction from dominating American politics. Thus, where other nations have attempted to define themselves along common lines of religious, cultural, or ethnic orientation, the United States sought to define itself along culturally pluralist lines.

Clearly the most important source of the distinctive American governmental vision is *Federalist* 10, which conditions the potential benefits of diversity upon making it:

less probable that a majority of the whole will have a common motive to invade the rights of other citizens; or if such a common motive exists, it will be more difficult for all who feel it to discover their own strength, and to act in unison with each other . . . . The influence of factious leaders may kindle a flame within their particular States, but will be unable to spread a general conflagration through the other states: a religious sect, may degenerate into a political faction in a part of the Confederacy; but the variety of sects dispersed over the entire face of it, must secure the national Councils against any danger from that source.<sup>46</sup>

The reality is that the Frenchman's vision of a Frenchman does not include Moroccans or Libyans or Ghanians any more than a Serb's vision of Serbia includes Croatsians. By contrast, a representative American's image of an American includes members of every imaginable ethnic group. As Nathan Glazer has observed, the distinctive feature of the American Constitution is that unlike states such as India, Belgium, Canada, Yugoslavia, or other nations, the various ethnic groups in America cannot be marked off by distinct territorial boundaries.<sup>47</sup>

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44. Nathan Glazer, *The Constitution and American Diversity*, in *FORGING UNITY OUT OF DIVERSITY: THE APPROACHES OF EIGHT NATIONS* 60, 62 (Robert A. Goldwin et al. eds., 1989).

45. Thomas L. Pangle, *Commentary*, in *FORGING UNITY OUT OF DIVERSITY: THE APPROACHES OF EIGHT NATIONS* 85, 92 (Robert A. Goldwin et al. eds., 1989).

46. *THE FEDERALIST* No. 10, at 64-65 (James Madison) (Jacob E. Cooke ed., 1961).

47. Glazer, *supra* note 44, at 63.



Even a cursory glance at American history reveals, however, that despite its diversity the United States has not always been (and still is not) a completely inclusionary democracy. Slavery, the lack of suffrage of women and minorities, the fact that African-Americans counted only three-fifths as much as whites in calculating the apportionment of representatives, and the systematic exclusion of minorities from important aspects of the economy until well into the twentieth century show that America has evolved from a decidedly exclusionary (albeit diverse) democracy into an increasingly inclusionary democracy.

There are two important points to be made about this distinction between exclusionary and inclusionary democracies, one philosophical and the other practical. The philosophical point recalls Hegel's ideas about freedom and human flourishing. Hegel believed that a fully developed nation-state reflects the fundamental beliefs and ethical ideals of its people. For Hegel, individual freedom is not a natural condition; it flows from the state. People are free when they live in a political state governed by laws, norms, and state-sponsored ethical ideals identical to their own. As T. Z. Lavine has observed, the citizen of a state is free when the ideals by which the culture and the state defines itself coincide with the ideals by which that particular citizen chooses to define herself. When this happens:

[T]he laws of your society no longer appear alien or oppressive to you; they appear instead as identical to your own laws for yourself. And thus there is an end to the opposition between your individual freedom and the power of federal laws; there comes an end to your sensing that the laws of the federal government are oppressing you, are coercive upon you, and are a heavy yoke for you to bear. And, Hegel adds, in this way there is an end to the opposition between your personal will and the will of the state, since you have now identified your own will with the larger will which is that of the state. This, then, is the meaning of substantial freedom: Substantial freedom consists in the identification of personal ideals with the ideals of the state, which embody the ethical substance of the society.<sup>48</sup>

The implication of Hegel's analysis seems clear. It is more difficult for citizens of the United States and other inclusionary democracies to achieve freedom in the Hegelian sense than it is for citizens in exclusionary democracies. The more diverse, polyglot and multicultural a society, the less likely it will be that any particular citizen will find it possible to internalize the ideals of her culture.<sup>49</sup> In a diverse society, the ideals that the state has selected are unlikely to be the ideals that any particular citizen would choose for himself.

In other words, for Hegel, citizens will be happy when their own aspirations, ideals and norms coincide with the aspirations, ideals and norms that the state prescribes. When citizens identify with the state to

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48. T. Z. LAVINE, *FROM SOCRATES TO SARTRE: THE PHILOSOPHIC QUEST* 249 (1984).

49. *Id.* at 248.

this extent, man's historical existentialist struggle with separation, isolation, and conflict will end.<sup>50</sup> Then, history itself will end.

Hegel's ideal society was ancient Athens in the age of Pericles because citizens "lived in the profound happiness and blessed satisfaction of identifying with the greatness of their own society, sharing fully in its ideals, and participating whole-heartedly in its government."<sup>51</sup> Clearly for Hegel, if not for Fukuyama, it will be far easier for Japan or even Croatia to achieve an ideal society than for the United States.

The practical implication of the distinction between exclusionary and inclusionary democracies flows from the philosophical point. The more homogeneous a country is, the easier it will be for its citizens to embrace democratic values. People who are confident that the preferences of the majority match their own will not regret entrusting important issues to the will of that majority. In other words, the extent to which citizens of a state are willing to entrust their fates to democratic principles and majority rule correlates directly with how strongly those citizens identify with the values of the majority. Thus, it is far easier to embrace democracy and other liberal values once one has defined the relevant political boundaries to exclude those who disagree fundamentally with you.

The more difficult question becomes whether it is possible to maintain a stable, flourishing democracy in an inclusionary state. As noted earlier,<sup>52</sup> there is a tension between liberalism, which emphasizes individual rights that can be asserted against the state, and democracy, which emphasizes the right of majorities to dictate outcomes. This tension becomes particularly acute in inclusionary democracies when majorities and shifting coalitions of interest groups seek to control the political process to infringe on the rights of other citizens.

The question of whether inclusionary democracies can survive will, therefore, depend on how effectively such democracies can balance liberal rights against democratic values. This, in turn, will depend on how well their constitutions allocate such rights and values. The following section will explain how an inclusionary democracy uses constitutional theory to resolve the practical problems of governing a heterogeneous society.

## B. Liberalism and Democracy

The preceding section portrayed a rather dismal image of majorities and interest-group coalitions conspiring to interfere with citizens' rights. The contemporary history of the United States proves the image to be both disturbingly accurate and profoundly off the mark. The image seems accurate because it corresponds so closely to recent American political history, in which well-publicized struggles among interest

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50. *Id.* at 249.

51. *Id.*

52. See *supra* notes 15-17 and accompanying text.

groups have dominated all aspects of the political scene, from civil rights to tax reform to banking reform. The preferences of the interest groups and allied political constituencies appear to govern politicians' visions of the good.

Despite the heterogeneity of American society, America's romantic embrace of the principles of equality and individual rights and its embrace of the rule of law, nonetheless, appear not only to have survived, but even to have flourished over the past two-hundred years.<sup>53</sup> In order to understand how an inclusive democracy is to survive, one must explain the simultaneous coexistence of these two seemingly incompatible states of affairs.

People are exceedingly complex. People who aspire to embrace principles of equality and individual rights often will jettison these same principles when it is expedient. To understand the tension between people's ideals for themselves and humanity, and their day-to-day struggles for material wealth, is to understand a basic principle of constitutional theory: the distinction between constitution-making and ordinary law-making.

It is possible for people to rise above their ordinary self-interest in their ordinary lives. So too is it possible for a people to understand that the process of forming a constitution provides both opportunity and incentive for people with radically different short-term interests to put temporal differences to one side and to agree on the rules of the political process for the future.

So long as people *realize* that their interests fundamentally differ from other people's, they will be in a position to forge constitutions that channel and control their self-interested behavior. In a democracy, the presence of rival interests causes people to spend resources and energy in efforts to ensure that their private vision of the good will prevail against the competing assertions of other groups. Resources and energy must also be spent to ensure that other groups will not succeed in gaining control of the political agenda.

In ordinary times, people will act in self-interested ways. In a democracy, this self-interested behavior will manifest itself as majorities and interest groups seek political advantages over rivals who can be exploited for economic gain. But this game, in which rival groups compete for political spoils is a *negative-sum game* because the energies and resources spent in the competition represent a loss of real resources.

If the people who come together to form an inclusionary political community recognize *ex ante* (at the time the nation's constitution is being formed) that the nation's energies and resources are in danger of being consumed in the struggle among rival groups, they will have an incentive to develop constitutional safeguards against that eventuality.

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53. See *supra* notes 45-47 and accompanying text.

Indeed, this feature distinguishes the American Constitution.<sup>54</sup>

The Framers of the American Constitution drafted a document that presumed self-interestedness. In this sense, the American Constitution is profoundly and fundamentally anti-Hegelian. As suggested above, in Hegel's vision, people must think more or less alike, or else they will be unable to internalize the same cultural norms, ideals, and aspirations. Unlike the Hegelian vision, which sees civic society as a realm in which citizens flourish by reaching shared moral and ethical understandings, the Framers took the far more realistic view that people's private interests inevitably will conflict.

If nothing else, the Framers of the American Constitution were knowledgeable about world history and intent on avoiding the mistakes of the past. Although they wanted to embrace democracy and reject totalitarianism in general and monarchy in particular, they recognized that previous attempts at organizing democracies had deteriorated to "spectacles of turbulence and contention."<sup>55</sup> The Framers hoped to avoid such dire results by channelling people's rational self-interest in productive directions.

Thus, as one of us has explained elsewhere, the Framers attempted to resolve the problems they expected America to face by embracing the simple assumption that characterizes all of neoclassical economic analysis, the assumption of human self-interestedness:

[T]o say that the Framers employed the economic assumption of self-interestedness does not mean that the Framers were of the view that people place their own, selfish goals above those of society as a whole in all contexts and situations. Rather, it means simply that the Framers were of the view that they could draft a better constitution by making the assumption that self-interestedness would be the dominant motivating force in human nature often enough so that their failure to embrace that assumption would have disastrous effects on post-constitutional America. In other words, the way to invoke the assumptions of economics to produce a successful constitution is to draft a document that deals with the way men generally behave rather than the way that men always behave.<sup>56</sup>

Thus, starting with the idea that the pursuit of self-interested political solutions to economic and social problems is a negative-sum game, the Framers rationally concluded that the way to prevent the game from destroying civil society was to make it costly to play. The Framers recognized that government tends to provide rational, self-interested citizens with incentives to organize into special interest groups in order to demand regulation that makes them better off. Regulation that makes one faction better off inevitably transfers wealth from rival groups, rather than by creating new wealth.<sup>57</sup>

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54. Jonathan R. Macey, *Competing Economic Views of the Constitution*, 56 GEO. WASH. L. REV. 50 (1987).

55. THE FEDERALIST NO. 10, at 61 (James Madison) (Jacob E. Cooke ed., 1961).

56. Macey, *supra* note 54, at 55.

57. *Id.* at 57.

In a nutshell then, the problem identified in the previous section was well understood by the Framers. The Framers recognized that every imaginable group included under society's umbrella would attempt to transform itself into a distributional coalition. Consequently, the Framers embraced a two-part strategy for dealing with the problem of factions and interest groups. The first part of the strategy was to channel human activity towards the marketplace to the fullest extent possible. The second part of the strategy was to impose structural barriers on efforts by interest groups and other distributional coalitions in order to make access to the political sphere more costly.

The Framers were among the first generation in world history to embrace the ideas contained in Adam Smith's *The Wealth of Nations*, published in 1776, just prior to the Constitutional Convention in Philadelphia. Smith's ideas revealed the possibility that society could be structured in a manner that allowed rational self-interest to act as an "invisible hand" through which the common good could be achieved through the efforts of individual economic actors to pursue their own ends.<sup>58</sup> Individual economic actors pursuing their own ends in the private sector increase societal wealth. Entrepreneurs are "coaxed by competitive forces to provide what others want on improved terms, a serendipitous benefit to the public that was in no way a part of the entrepreneur's intentions."<sup>59</sup>

By contrast, when economic actors shift their energies from the private sector to the legislative arena, individuals pursuing their own economic ends decrease societal wealth because the pursuit of self-interest in the legislative arena involves wealth transfers, which decrease aggregate social welfare. The process in which special interest groups go to the legislature to seek and obtain wealth transfers might at first appear to be simply a zero-sum game in which the gains to the winning groups exactly offset the losses from other groups, and so, on balance, there are neither winners nor losers. But this is not the case. The process of rent-seeking imposes significant costs on society for several reasons. First, groups expend resources that might be allocated to productive uses on lobbying and otherwise obtaining political influence. Similarly, losing groups waste resources by attempting to block legislation that imposes costs on them.

Some costs of the wealth-transfer process are very subtle. For example, sometimes legislation effectuating wealth transfers results in unnecessary regulations that impose greater costs on some firms than others, thus giving certain firms a competitive edge. Where such regulations exist, deadweight loss results as the parties subject to the regulation expend resources to bring themselves into compliance. In addition, regulation that effectuates wealth transfers prompts economic resources

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58. *Id.* at 55.

59. This formulation of Adam Smith's insight is found in Richard B. McKenzie, *Introduction*, in *CONSTITUTIONAL ECONOMICS: CONTAINING THE ECONOMIC POWERS OF GOVERNMENT* 4 (Richard B. McKenzie ed., 1984).

to be diverted to less valued, but unregulated, uses. And the prospect of interest-group wealth transfer activity imposes costs even on markets that *appear* to be operating free of government interference, as firms and individuals operating in such markets must expend resources to keep themselves free of government regulation.<sup>60</sup> Thus, "economic actors expend vast amounts of resources to obtain rent-seeking legislation, to comply with it, to avoid having to comply with it, to adjust to it, and to prevent it from being enacted in the first place."<sup>61</sup> The *Federalist* papers make it clear that the Framers, recognizing the phenomena described here at a remarkably sophisticated, albeit impressionistic level, enacted strong bulwarks to channel human behavior in the new republic toward the private sector and away from the public sector.

The second part of the Framers' strategy was to erect structural barriers within the Constitution to impede the problem of factions. As noted above, these structural features included: a bicameral legislature with houses of different sizes and members who represent different constituencies; provision for a presidential veto; and an independent judiciary, all of which raise the decisions costs of government and make it more difficult for special interest groups to enact laws.<sup>62</sup> In addition, the First Amendment guarantees of freedom of the press and free speech also impede interest group wealth transfers by protecting the integrity of the political process, in order to promote majority rule at the expense of special interest groups.<sup>63</sup> Similarly, as Professor Cass R. Sunstein has pointed out, the Commerce Clause, the Privileges and Immunities Clause, the Equal Protection Clause, the Due Process Clause, the Contract Clause and the Eminent Domain Clause have all been shown to be "united by a common theme and focused on a single underlying evil: the distribution of resources or opportunities to one group rather than another solely on the ground that those favored have exercised the raw political power to obtain what they want."<sup>64</sup>

### C. Republicanism Versus Pluralism: The Costs and Benefits of Heterogeneity

As suggested above, two sorts of national regimes will emerge to compete with American-style liberal democracies. First, culturally, ethnically, and religiously homogenous countries represent one form of sharp contrast to the heterogeneous United States. Second, what might be described as "illiberal capitalist" regimes, which are capitalist economies directed by authoritarian regimes, also provide a source of systemic

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60. Fred S. McChesney, *Rent Extraction, Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101, 102-03 (1987).

61. Macey, *supra* note 29, at 479.

62. See *supra* notes 38-41 and accompanying text.

63. Macey, *supra* note 38, at 249.

64. Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689, 1689 (1984).

competition to the liberal democracy that houses capitalism in the United States.

We wish to emphasize that a particular government may compete with the United States along both of the vectors described above. That is to say, a people may be culturally, ethnically, and religiously homogeneous *and* be governed by an authoritarian regime. Singapore leaps immediately to mind. Where that is the case, if each of these conditions is more hospitable to capitalism than liberal democracies, those advantages will be compounded.

At first blush it would appear that regimes possessing either of these characteristics have a distinct advantage over liberal democracies because they will be able to curtail the destructive forces of special interest groups far better than diverse liberal democracies such as the United States. It would appear that cultural, religious, and ethnic homogeneity would prevent the rise of special interest groups because the division of interests that is a necessary precondition to the formation of such groups would never appear. Similarly, it would appear that authoritarian regimes could control interest-group wealth transfer activity because the tension between economic rights and democratic values that plagues liberal democracies could be reduced through the exercise of authoritarian power. But appearances can be deceiving and these facile assumptions are subject to serious challenge.

First, as noted in Section Two, a distinctive feature of the American constitutional system is that it contains myriad institutional and structural devices designed to constrain and mitigate rent-seeking by interest groups.<sup>65</sup> These devices were put into place by the Framers because they knew that the United States would be a diverse nation characterized by competing interests, and they wanted to put a system of government in place to reduce the efficacy of these factions and special interests.

To this point one might respond that the homogeneous, exclusionary democracies do not need checks and balances and other constitutional impediments to interest groups because their homogeneity sufficiently impedes the formation of special interest groups. But this assumption ignores the important findings of Mancur Olson to the effect that, over time, distributional coalitions inevitably arise in market economies because the same invisible hand that leads people to engage in wealth-creating activities in the private sector leads them to organize into distributional coalitions to obtain wealth transfers from the public sector.<sup>66</sup> The government's ability to coerce prompts rational, self-interested citizens to organize into special interest-group coalitions to make themselves better off at the expense of other groups of citizens.

Thus, no matter how homogeneous a particular country's citizens happen to be, absent constitutional impediments, welfare-reducing interest-group coalitions inevitably will arise. Even the most homoge-

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65. See *supra* notes 38-41 and accompanying text.

66. OLSON, *supra* note 27, at 36-74.

nous society will find that some people emerge as laborers, some as government bureaucrats, some as lawyers, some as doctors, some as suppliers of capital, etc. The interests of these various groups inevitably will conflict with one another in complex and unforeseen ways. Further, even if they do not, members of these groups have an incentive to expend resources to redistribute societal income to themselves by organizing into effective political coalitions for the purpose of obtaining such transfers.

Mancur Olson's thesis shows that "stable societies with unchanged boundaries tend to accumulate more collusions and organizations for collective action over time."<sup>67</sup> Further, unlike the Framers of the American Constitution, those organizing constitutional regimes in nearly homogeneous countries such as Israel, Italy, Japan, or Russia may observe a temporary commonality of interests at the outset of the country's formation, and hence may not anticipate the pressures that will arise as interest groups and distributional coalitions emerge over time.<sup>68</sup> As Olson has observed:

[A] stable society will see more organization for collective action as time passes (unless, of course, constitutional and legal constraints on collective action, or on the changes in public policies lobbying is permitted to bring about, should leave little scope for such organizations). The more time that passes, the larger the number of those groups that are in situations in which collective action is a possibility will have enjoyed the favorable circumstances and innovative political leadership that they need to organize, and the greater the likelihood that the organizations that have been created will have achieved their potential.<sup>69</sup>

Thus, nations that start out as exclusionary democracies, characterized by homogeneity and lack of conflict among competing religious, ethnic, and cultural groups, will nevertheless find themselves subjected to the problem of faction because coalitions will arise from within over time. Thus, the United States may have a competitive historical advantage over other countries, particularly Japan, Israel and certain others because the United States is *prepared* for the problem of faction, while these other countries are making the same mistake as Hegel and Fukuyama in thinking that temporary social consensus can last indefinitely in the face of self-interest.

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67. *Id.* at 74.

68. Many of the emerging democracies of Eastern Europe (Poland, Hungary, and Albania, for example) are quite homogeneous by any measure, and countries such as Bulgaria and Czechoslovakia, which often are described as heterogeneous, have only one significant minority. Bulgaria, for example, is sometimes characterized as heterogeneous because about ten percent of its population is Muslim. Czechoslovakia is divided between its minority Slovak population and its majority Czech population, although there is some ethnic conflict among residents of Bohemia and Moravia and Silesia. See Jon Elster, *Constitutionalism in Eastern Europe: An Introduction*, 58 U. CHI. L. REV. 447, 450-51 (1991). Thus, Eastern European countries differ from the United States, which is far more diverse and pluralistic.

69. OLSON, *supra* note 27, at 40.



#### IV. Possibilities for Human Flourishing in the New World Order

By now it should be clear that Fukuyama's argument that the possibilities for human flourishing have decreased because of the degree of consensus achieved in the New World Order is deeply flawed. As suggested above, it still is not clear what form of social ordering will best succeed in containing capitalism. America's experiment with multiculturalism may succeed, but this is by no means certain. It does seem clear that the emerging capitalist nations of Eastern Europe are making a serious error by predicating their constitutional regimes on the flawed assumption that shared cultural, religious, and ethnic heritages will prevent conflict and the sort of interest-group divisiveness that so preoccupied the Framers of the American Constitution.

In this regard it is instructive to note that the purpose of the Philadelphia convention was to deal with the serious problems of self-governance that had arisen in the state legislatures in America during the decade after the Revolution. While the period following the Revolution initially was marked by rapid economic growth,<sup>70</sup> the state governments were threatening that growth by catering to special interests, particularly debtor landholding interests. James Madison defended the Constitution against the claim that power should be left with the states, observing that each legislature was "every where extending the sphere of its activity, and drawing all power into its impetuous vortex."<sup>71</sup> These states were quite homogenous and non-diverse, particularly compared to the nation as a whole. History, of course, shows that this homogeneity did not prevent interest groups from coming to dominate state legislatures in the period following the Revolution.

The process of forming separate governments out of the former Soviet republics resembles the process of forming the United States in reverse. While the Framers of the United States began with a series of states banding together in a common market, the former Soviet republics are attempting to form a large group of independent states out of a single large state. The founders of these emerging republics, however, should not be misled into believing that the problems their regimes will face can be solved by a surfeit of temporary consensus. Conflict inevitably will emerge, and they, like the Framers of the American Constitution, would be well-served to prepare themselves for that conflict.

Currently, there is, of course, a recognition that there is a need to balance the competing interests of the rival groups that already exist in the emerging democracies in Eastern Europe. Thus, for example, in Czechoslovakia, the Czechs and the Slovaks have attempted to create a "federative state" comprised of two equal, fraternal nations, and the two republics each have claims on political, judicial and administrative

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70. MERRILL JENSEN, *A NEW NATION: A HISTORY OF THE UNITED STATES DURING THE CONFEDERATION 1781-1789*, 423-24 (1965).

71. *THE FEDERALIST* No. 48, at 333 (James Madison) (Jacob E. Cooke ed., 1961).

offices within the federal government. But it is not clear how other interest groups that may emerge in the future will be dealt with.

Similarly, the rulers of authoritarian regimes, such as Singapore, and regimes built on consensus, such as Japan, should not conclude that their systems of government are superior at promoting stability and reducing the incidence of interest-group wealth transfers. After all, it is not at all obvious that interest groups and welfare-reducing distributional coalitions fare less well under authoritarian regimes than under liberal democracies. In a liberal democracy such as the United States, which is characterized by divided government and separated powers, interest groups must obtain a remarkable level of consensus before they can transform their private preferences into public policy. By contrast, under an authoritarian regime, narrow interest groups need only convince a single despot that their wishes should become law. For this reason alone it is not obvious that authoritarian regimes will reduce wealth transfers below the levels at which such transfers are observed in liberal democracies.

In addition, liberal democracies are characterized by, among other things, freedom of mobility of people and capital. Authoritarian regimes generally do not share this characteristic. This free transferability of capital and labor across borders reduces the ability of politicians and interest groups to effectuate welfare-reducing wealth transfers. As long as people and capital can move freely across borders, wealth transfers are very costly for government because the people and firms that must pay for such transfers will elect to leave the jurisdiction to avoid such costs. Thus, if a government allows free movement across borders, other states serve as a source of healthy competition. Narrow interest groups will be limited in their ability to exploit the majority through wealth transfers. As Douglass North has observed:

The ruler always has rivals: competing states, or potential rulers within his own state . . . . Where there are no close substitutes, an existing ruler will be characterized as a despot, a dictator, or an absolute monarch. The closer the substitutes, the fewer degrees of freedom the ruler possesses, and the greater the percentage of incremental income that will be retained by the constituents.<sup>72</sup>

In the United States, the states serve as an important source of competition among competing governments. Mobility of capital and labor insure that if one state becomes the captive of special interest groups, the firms and individuals supporting these wealth redistributions can, at fairly low cost, relocate to another jurisdiction.

Thus, just as ethnic, religious, or cultural diversity is not likely to doom the residents of the United States to second-class status in the New World Order, the fact that the United States contains its capitalism regime within a liberal democracy instead of within an authoritarian

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72. Douglass North, *A Framework for Analyzing the State in Economic History*, 16 *EXPLORATIONS ECON. HIST.* 249, 255 (1979).

state also does not portend the decline of the decidedly pluralist, democratic American state.

### **Conclusion**

The end of the Cold War and the emergence of the United States as the world's only superpower do not mark the end of history; these events mark the beginning of a new phase of history. The only question that has been settled to this point is how resources within a society can best be allocated. The answer is that state socialism cannot rival capitalism and private markets as a mechanism for producing goods and services. The remaining and far more interesting questions concern what sorts of political systems can best harness the capitalist engine, and finally, whether capitalism can survive in an inclusionary democracy such as the one that exists in the United States.

Fukuyama's pessimistic belief that the New World Order will be followed by the "banalization of life through modern consumerism," in which the empty, mediocre and solipsistic will replace the bold, ambitious, world-conquerors of previous generations, is misguided and historical. It is historical because it ignores the fact that the Framers of the American Constitution were concerned with the same issues that plague social thinkers today. Then as now these questions concern: (1) how best to reconcile the majoritarian claims of a democracy with the individual rights necessary in a society that claims to respect private property and personal liberty; and (2) how best to prevent factions, interest groups and distributional coalitions from destroying the system of private property and free enterprise necessary for human flourishing and the creation of wealth.

